(5)

No. 04-742

In the Supreme Court of the United States

JOHN DOE, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly held that petitioners, a class of current and former Department of Justice attorneys, cannot obtain an award of overtime compensation for work performed between 1992 and 1999, because the work was not ordered or approved in writing by an authorized official, as required by a regulation that implements the Federal Employees Pay Act of 1945, ch. 212, 59 Stat. 295.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Argument	10
Conclusion	20

TABLE OF AUTHORITIES

Cases:

Anderson v. *United States*, 136 Ct. Cl. 365 (1957) 5, 16, 17

Anderson v. *United States*, 120 Ct. Cl. 660 (1973) 4

Chevron U.S.A. Inc. v. *Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984) 12

Doe v. *Tenet*, 329 F.3d 1135 (9th Cir. 2003), cert. granted, 124 S. Ct. 2908 (2004) 18

FCIC v. *Merrill*, 332 U.S. 380 (1947) 17

FDIC v. *Ernst & Young LLP*, 374 F.3d 579 (7th Cir. 2004) 18

Flick v. *Liberty Mut. Fire Ins. Co.*, 205 F.3d 386 (9th Cir.), cert. denied, 531 U.S. 927 (2000) 18

Hamilton-Brown Shoe Co. v. *Wolf Bros. & Co.*, 240 U.S. 251 (1916) 12

Jackson v. *Culinary Sch. of Washington, Ltd.*, 27 F.3d 573 (D.C. Cir. 1994), vacated and remanded on other grounds, 515 U.S. 1139 (1995) 17

Johnson v. *Guhl*, 357 F.3d 403 (3d Cir. 2004) 17

McQuown v. *United States*, 199 Ct. Cl. 858 (1972) .. 16

National Muffler Dealers Ass'n v. *United States*, 440 U.S. 472 (1979) 13

Office of Pers. Mgmt. v. *Richmond*, 496 U.S. 414 (1990) 6, 15, 16

Cases—Continued: Page

Robertson v. *Seattle Audubon Soc'y*, 503 U.S. 429 (1992) 11

Schweiker v. *Hansen*, 450 U.S. 785 (1981) 6, 15, 16, 17

United States v. *Mead Corp.*, 533 U.S. 218 (2001) .. 12

Statutes and regulation:

Department of Justice Appropriations Act, 2000, Pub. L. No. 106-113, § 1000(a)(1), 113 Stat. 1501A-21 (§ 115) 3, 4, 10

Fair Labor Standards Act of 1938, 29 U.S.C. 203(g) 7, 13

Federal Employees Pay Act of 1945, ch. 212, 59 Stat. 295 2

§ 605, 59 Stat. 304 (§ 605) 2, 12

5 U.S.C. 5541 note 3

5 U.S.C. 5542 ..... 9, 11, 12

5 U.S.C. 5542(a) 10, 13

5 U.S.C. 5543 11

5 U.S.C. 5545 ..... 9, 12

5 U.S.C. 5546 ..... 9, 12

5 U.S.C. 5547 (2000 & Supp. I 2001) 2

5 U.S.C. 5548 ..... 3, 12

5 U.S.C. 5548(a) 6

5 C.F.R. 550.111(c) 3, 10, 12, 15

Miscellaneous:

Exec. Order No. 9578, 10 Fed. Reg. (1945):

p. 8191 3

p. 8194 3

33 Fed. Reg. 12,402 (1968) 3

Miscellaneous—Continued: Page

Salary and Wage Administration in the Federal Service: Hearing on H.R. 2497 and H.R. 2703 Before the House Comm. on the Civil Service, 79th Cong., 1st Sess. (1945) 7, 13, 14

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-28a) is reported at 372 F.3d 1347. The opinion of the Court of Federal Claims (Pet. App. 33a-63a) is reported at 54 Fed. Cl. 404.

JURISDICTION

The judgment of the court of appeals was entered on June 23, 2004. A petition for rehearing was denied on September 1, 2004 (Pet. App. 29a). The petition for a writ of certiorari was filed on November 29, 2004. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Congress enacted the Federal Employees Pay Act of 1945 (FEPA), ch. 212, 59 Stat. 295, to address the compensation of federal employees in the post-war environment. The provision at issue in this litigation governs overtime compensation. It states:

> For full-time, part-time and intermittent tours of duty, hours of work *officially ordered or approved* in excess of 40 hours in an administrative workweek, or * * * in excess of 8 hours in a day, performed by an employee are overtime work and shall be paid for * * * at [specified rates].

5 U.S.C. 5542(a) (emphasis added).[1]

The FEPA expressly delegated rulemaking authority to the Civil Service Commission. § 605, 59 Stat. 304. Days after the FEPA became law, the Civil Service Commission issued implementing regulations that were approved by the President in Executive Order No. 9578, 10 Fed. Reg. 8191 (1945). Section 401(c) of those regulations provided that compensable overtime must be officially ordered or approved in writing by an authorized official:

> No overtime in excess of the administrative workweek shall be ordered or approved except in writing by an officer or employee to whom such authority has been specifically delegated by the head of the department

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[1] Overtime compensation may be paid "only to the extent that the payment does not cause the aggregate of basic pay and such premium pay for any pay period for such employee to exceed" the maximum rate of basic pay payable for GS-15 employees or the rate payable for employees on level V of the Executive Schedule. 5 U.S.C. 5547 (2000 & Supp. I 2001).

> or independent establishment or agency, or Government-owned or controlled corporation.

10 Fed. Reg. 8191, 8194 (1945).

In 1968, the Commission revised its regulations but "ma[de] no substantive changes." 33 Fed. Reg. 12,402. The revised regulations were adopted verbatim by the Office of Personnel Management (OPM), which supplanted the Civil Service Commission and was granted express authority to prescribe regulations to administer the FEPA, see 5 U.S.C. 5548. The OPM regulation at issue provides:

> Overtime work in excess of any included in a regularly scheduled administrative workweek may be ordered or approved only in writing by an officer or employee to whom this authority has been specifically delegated.

5 C.F.R. 550.111(c).

In 1999, in response to this litigation, Congress enacted a statute barring the payment of overtime compensation to Department of Justice attorneys for work performed after the enactment of that legislation. See Department of Justice Appropriations Act, 2000, Pub. L. No. 106-113, Div. B, § 1000(a)(1), 113 Stat. 1501A-21 (5 U.S.C. 5541 note); see Pet. App. 2a n.1.[2]

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[2] Section 115 of the 1999 legislation provides:

> (a) None of the funds made available by this or any other Act may be used to pay premium pay under title 5, United States Code, sections 5542-5549, to any individual employed as an attorney, including an Assistant United States Attorney, in the Department of Justice for any work performed on or after the date of the enactment of this Act [Nov. 29, 1999].
>
> (b) Notwithstanding any other provision of law, neither the

2. Petitioners are a class of more than 9000 present and former Department of Justice attorneys who filed this Tucker Act lawsuit in 1998. C.A. App. 52-53. The complaint alleged that "because defendant expected, encouraged, or induced plaintiffs to work substantial amounts of overtime and had knowledge that plaintiffs work substantial amounts of overtime, [it] authorized and approved the overtime under 5 U.S.C. § 5542." *Id.* at 66.

Following discovery, the Court of Federal Claims granted summary judgment with respect to liability for the entire plaintiff class, and denied the government's cross-motion for summary judgment. Pet. App. 63a. After recognizing that the plaintiff class had received no explicit orders or approvals, written or otherwise, to perform particular work in excess of a 40-hour week, *id.* at 44a, the court declared that "[t]he question in this case is whether less than explicit orders or approvals suffice." *Id.* at 45a.

The court answered that question in the affirmative. It observed that the Court of Claims had "taken almost every conceivable position with regard to overtime," such that "an employee seeking overtime can likely find an opinion of [the Court of Claims] that fits his situation regardless of what it may be." Pet. App. 44a (quoting *Anderson* v. *United States*, 201 Ct. Cl. 660, 675 (1973)

United States nor any individual or entity acting on its behalf shall be liable for premium pay under title 5, United States Code, sections 5542-5549, for any work performed on or after the date of the enactment of this Act [Nov. 29, 1999] by any individual employed as an attorney in the Department of Justice, including an Assistant United States Attorney.

Sec. 1000(a)(1), § 115(a)-(b), 113 Stat. 1501A-21.

(Skelton, J., dissenting)). The trial court recognized that decisions of the Court of Claims in the years following enactment of the FEPA would not have permitted overtime compensation in this litigation. *Id.* at 45a-46a. It concluded, however, that beginning with *Anderson* v. *United States*, 136 Ct. Cl. 365 (1956), the cases had moved toward the use of "more equitable considerations to decide overtime pay claims against the Government." Pet. App. 45a.

The court found evidence that the Department had a "culture" of expecting overtime in the deposition testimony of Stephen R. Colgate, the Assistant Attorney General for Administration, who was "the only person who had authority to order or approve overtime for the entire Class." Pet. App. 54a. The court believed that Mr. Colgate's "understanding of the 'culture' of the Department was that attorneys were expected to work overtime when necessary to complete their tasks." *Id.* at 53a. The court found additional evidence of the Department's culture in the U.S. Attorney Manual and various other documents. *Id.* at 55a-56a.

The court thus entered summary judgment for the plaintiff class with respect to liability, and denied the government's cross-motion for summary judgment. The court indicated that in subsequent damages proceedings, a class member would be entitled to recover if he could show "that what he [did was] worth doing, and [was] reasonably calculated to promote the end for which he [was] employed." Pet. App. 62a (quoting *Anderson*, 136 Ct. Cl. at 367).

3. On an interlocutory appeal, a unanimous panel of the Federal Circuit (Rader, Bryson, and Dyk, J.J.) reversed. "Because the overtime here was not officially ordered or approved in writing as required by the

[OPM] regulation," the court held that "the plaintiffs were not entitled to compensation under FEPA." Pet. App. 1a.

The court of appeals concluded that the Court of Claims' *Anderson* line of cases could not be reconciled with this Court's decisions in *Schweiker* v. *Hansen*, 450 U.S. 785 (1981) (per curiam), and *Office of Personnel Management* v. *Richmond*, 496 U.S. 414 (1990). Pet. App. 12a-15a. *Hansen*, the court noted, established that "[a] court is no more authorized to overlook [a] valid regulation requiring that applications be in writing than it is to overlook any other valid requirement for the receipt of benefits." *Id.* at 13a (quoting *Hansen*, 450 U.S. at 790). The *Anderson* line of cases, by contrast, had refused to give effect to the OPM regulation "because it added a procedural writing requirement to the substantive requirements of FEPA," a mode of analysis that could not survive *Hansen*. *Id.* at 12a.

The court explained that the *Anderson* line of cases "fares no better if it is viewed as resting on 'equitable' considerations," because "*Hansen* directly held that such considerations could not impose liability on the government, a result reinforced in [*Richmond*]." Pet. App. 14a (citations omitted). The court observed that *Richmond*, relying on *Hansen*, "rejected the plaintiff's estoppel claim because 'the equitable doctrine of estoppel cannot grant [the plaintiff] a money remedy that Congress has not authorized.'" *Ibid.* (quoting *Richmond*, 496 U.S. at 426, 429).

The court rejected petitioners' other challenges to the validity of the OPM regulation. It observed that Congress authorized OPM to prescribe regulations "necessary for the administration" of FEPA, 5 U.S.C.

5548(a), a grant of authority that allows the agency to fill statutory gaps. Pet. App. 16a.

The court further held that the regulation reasonably implemented FEPA's directive that compensation be limited to extra hours of work that were "officially ordered or approved." Pet. App. 17a-24a. The court stressed that the regulation, which was issued by the Civil Service Commission almost contemporaneously with the enactment of the statute, *id.* at 24a, was directly responsive to Congress's concern that there be adequate controls over paid overtime to ensure that the Treasury did not face unanticipated liabilities. *Id.* at 22a-23a. In the hearings on the FEPA, Civil Service Commission member Arthur Flemming reassured Congress that there would be adequate controls on the payment of overtime because, under existing Civil Service Commission regulations, "requests for approval have to come all the way to the top." *Id.* at 23a (quoting *Salary and Wage Administration in the Federal Service: Hearing on H.R. 2497 and H.R. 2703 Before the House Comm. on the Civil Service* (*House Hearings*), 79th Cong., 1st Sess. 51 (1945)).

The court contrasted the FEPA's requirement that compensable overtime be "officially ordered or approved" with the standard that Congress had used seven years earlier in the Fair Labor Standards Act of 1938, which required compensation for overtime work that is "suffer[ed] or permit[ted]." 29 U.S.C. 203(g). The court explained that this contrast further supports OPM's view that FEPA requires "a more formal means of authorization." Pet. App. 22a.

After rejecting petitioners' challenge to the validity of the regulation, the court of appeals held that the regulation's writing requirement was not satisfied in

this case. Pet. App. 24a-27a. The court observed that "the vast majority of the writings cited by the plaintiffs were not written by officials with proper delegated authority to 'officially order[] or approve[],' 5 U.S.C. § 5542(a), overtime." *Id.* at 24a. Moreover, the court explained that "even those writings that were arguably issued by officials who were arguably authorized to order overtime are not orders or approvals within the meaning of the statute and regulation." *Id.* at 25a-26a.

The court rejected petitioners' heavy reliance on the U.S. Attorney Manual. Pet. App. 26a. Petitioners relied on a portion of the manual stating that Assistant United States Attorneys "are professionals and should expect to work in excess of regular hours without overtime premium pay." *Ibid.* The court explained that the manual thereby "instructs attorneys not to expect overtime compensation rather than instructing them to work particular amounts of overtime." *Ibid.* Further, the court explained that the Manual "repeatedly emphasizes the following two directives: 'overtime under 5 U.S.C. § 5542 must be approved in writing, in advance, by a person authorized to do so' and 'U.S. Attorneys are *not* authorized to approve overtime for attorney personnel.'" *Ibid.* (quoting the 1988 and 1992 Manuals). Thus, the Manual indicates, "if anything, that the plaintiffs' overtime work was not officially ordered or approved." *Ibid.*

The court found the other documents cited by the petitioners to be "even less supportive" of their claims. Pet. App. 26a. For example, the court explained that the maintenance of case management records showing hours worked beyond the 40-hour workweek "may indicate official awareness of the overtime worked, but

it does not provide prior written authorization or approval of such work." *Id.* at 27a.

The court of appeals stressed that it was not "countenancing any effort by DOJ or any other agency to evade the requirements of FEPA and the OPM regulation." Pet. App. 27a. "If an adverse personnel action were taken against an employee who declined to work uncompensated overtime, that action might well be found to be invalid." *Id.* at 27a-28a. The court emphasized, however, that "that is not a ground for awarding compensation that was not ordered and approved in strict compliance with the regulation." *Id.* at 28a. Thus, the court reversed the decision of the trial court and held that summary judgment should be entered for the government. *Id.* at 1a, 28a.

4. The court of appeals denied a petition for rehearing and rehearing *en banc*, without recorded dissent. See Pet. App. 29a.

5. On remand, the Court of Federal Claims dismissed the complaint. 9/16/04 Order. Petitioners moved for reconsideration of that order, and argued that the court of appeals' ruling on their claims for overtime compensation under 5 U.S.C. 5542 did not bar them from pursuing: claims for holiday pay under 5 U.S.C. 5546; claims for administratively uncontrollable overtime under 5 U.S.C. 5545; and alternative arguments for overtime compensation under 5 U.S.C. 5542. See Plaintiffs' Motion for Reconsideration; Plaintiffs' Supplemental Brief in Support of Rule 60 Motion for Reconsideration. After the parties completed two rounds of briefing on the motion for reconsideration, the trial court invited the parties to submit further briefing or to participate in a conference call regarding the motion. 1/25/05 Order at 4.

ARGUMENT

The decision of the court of appeals is correct, and does not conflict with any decision of this Court or any other court of appeals. Moreover, legislation enacted during this litigation deprived the issue of prospective significance, and petitioners are attempting to pursue their claims on remand to the trial court. Further review is not warranted.

1. Petitioners contend (Pet. 13-14) that the past conduct of various Justice Department officials should be deemed to satisfy the FEPA's requirement that compensable overtime be "officially ordered or approved," 5 U.S.C. 5542(a), notwithstanding the regulatory requirement that such orders or approvals be made in writing by an authorized official, 5 C.F.R. 550.111(c). That issue lacks prospective significance. As the court of appeals explained, Congress enacted legislation in 1999 that prohibits the payment of premium pay to Justice Department attorneys for work performed after the enactment of the legislation:

> Notwithstanding any other provision of law, neither the United States nor any individual or entity acting on its behalf shall be liable for premium pay under title 5, United States Code, sections 5542-5549, for any work performed on or after the date of the enactment of this Act [Nov. 29, 1999] by any individual employed as an attorney in the Department of Justice, including an Assistant United States Attorney.

Department of Justice Appropriations Act, 2000, Pub. L. No. 106-113, Div. B, Sec. 1000(a)(1), 113 Stat. 1501A-21, § 115(b); see Pet. App. 2a n.1. The sections of Title 5 referenced by Congress include those that provide for

overtime pay, see 5 U.S.C. 5542, and compensatory time, see 5 U.S.C. 5543. Thus, contrary to petitioners' suggestion (Pet. 30 n.18), the 1999 legislation bars the award of either overtime pay or compensatory time to Justice Department attorneys.

Petitioners assert (Pet. 30 n.18) that this legislation is invalid because it was enacted as part of an appropriations statute. It is well settled, however, that Congress may amend substantive law in appropriations statutes. See, *e.g.*, *Robertson* v. *Seattle Audubon Soc'y*, 503 U.S. 429, 440 (1992).

Petitioners also contend (Pet. 28-29) that the court of appeals' decision could have government-wide impact. Petitioners' theory in this case is a highly fact-specific one, however, that turns on the unique culture and practices of the Department of Justice. See, *e.g.*, Pet. 2-10, 13-14. Indeed, petitioners argued below that the standards for interlocutory appeal were not satisfied because the trial court's ruling was "unique to the specific facts of this case," in part because other agencies compensate attorneys for overtime. Plaintiffs' C.A. Response to Pet. for Permission to Appeal 10, 19. Petitioners similarly argued that the Justice Department is the "glaring exception" to agencies' payment of overtime to attorneys. Appellee C.A. Br. 13. The trial court's ruling had broad significance because it potentially authorized employees throughout the government to claim unknown amounts of overtime pay for work that had *not* been explicitly ordered or approved through official channels. But petitioners have not provided any reason to believe that the court of appeals' decision to uphold the controlling regulation requiring such order or approval will have any practical impact outside the Department of Justice.

2. Petitioners are currently arguing in the trial court that the court of appeals' ruling on the government's interlocutory appeal does not preclude the award of overtime compensation even in this case. Specifically, petitioners are attempting to advance: alternative arguments for overtime compensation under 5 U.S.C. 5542; claims for holiday pay under 5 U.S.C. 5546; and claims for administratively uncontrollable overtime under 5 U.S.C. 5545. See p. 9, *supra*. Although the government submits that the petitioners' arguments are meritless, the petitioners are asking this Court and the trial court to undertake potentially overlapping proceedings at the same time. Petitioners' simultaneous pursuit of relief in the trial court underscores the interlocutory character of their petition. This Court does not generally grant review in that procedural posture. See, *e.g.*, *Hamilton-Brown Shoe Co.* v. *Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916).

3. In any event, the decision of the court of appeals is correct and does not conflict with any decision of this Court or any other court of appeals.

a. The regulation that has always governed the availability of overtime compensation under the FEPA validly requires that compensable overtime "be ordered or approved only in writing by an officer or employee to whom this authority has been specifically delegated." 5 C.F.R. 550.111(c). Congress vested the Civil Service Commission and its successor, OPM, with authority to prescribe regulations to administer the FEPA. See § 605, 59 Stat. 304; 5 U.S.C. 5548. Under established principles of administrative law, their regulations are entitled to deference. See *United States* v. *Mead Corp.*, 533 U.S. 218, 227-230 (2001) (holding that agency regulations promulgated pursuant to congressional delega-

tion of authority are entitled to judicial deference under *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984)). Indeed, particular deference is warranted because the overtime regulation—issued within days of the FEPA's effective date—represents the contemporaneous interpretation of the statute by the principal Executive Branch advocate of the legislation, to which Congress expressly delegated rulemaking authority. See Pet. App. 24a; *National Muffler Dealers Ass'n* v. *United States*, 440 U.S. 472, 477 (1979) ("A regulation may have particular force if it is a substantially contemporaneous construction of the statute by those presumed to have been aware of congressional intent.").

The regulation reasonably implements the FEPA's directive that compensable overtime be "officially ordered or approved." 5 U.S.C. 5542(a). Whereas the Fair Labor Standards Act of 1938 authorized compensation for overtime work that was merely "suffer[ed] or permitt[ed]," 29 U.S.C. 203(g), the FEPA's requirement that compensable hours be "officially ordered or approved" contemplates a formal mechanism for ensuring control over overtime expenditures. Because "FEPA does not specify the form in which overtime must be 'ordered or approved,'" however, the court of appeals correctly concluded that the statute leaves a gap for the agency charged with its administration to fill. Pet. App. 18a-19a.

The Civil Service Commission's contemporaneous regulation responded directly to concerns expressed by Congress during the hearings on the FEPA. During the 1945 hearings before the House Committee on Civil Service, members of Congress expressed concern to Arthur Flemming of the Civil Service Commission that

the proposed legislation could allow federal agencies to incur overtime liability beyond the scope of their budgets. *House Hearings* 50-51. Representative Miller suggested that the budgetary process might permit adequate oversight and control because agency budgets would have to specify the amounts allotted for overtime compensation. "[T]he final check," he observed, "is the money that will have to be very definitely set up in the budgets of the departments for overtime pay." *Id.* at 51.

Representative Vursell, however, was uncertain that specifying overtime in agency budgets would be adequate to ensure congressional control over expenditures. He pointed out that Congress had "deficiency appropriations brought in rather regularly." *House Hearings* 51. Thus, Representative Vursell was "fearful that you don't have that check." *Ibid.* In response, Commissioner Flemming assured Congress that the requirement that compensable overtime be "officially ordered or approved" would prevent the government from becoming subject to unexpected monetary liability. *Ibid.* He explained that, "speaking now for my own agency, I know that the regulations under which overtime is ordered and compensated for are very strict, and in most instances requests for approval have to come all the way to the top." *Ibid.* And he added that, "under normal conditions, when appropriations would be much tighter than they are at the present time, the head of the agency, I can assure you, would put even stricter controls on than he might at the present time. If he didn't he would find himself in a position where he couldn't meet his pay roll." *Ibid.*

In short, Congress intended that overtime compensation would be paid only as specifically authorized by agency officials responsible for observing budgetary

constraints. Under no circumstances was Congress to be presented with requests for deficiency appropriations. In light of that legislative history, the court of appeals correctly recognized that the implementing regulation "serves an important purpose of the statute—to control the government's liability for overtime," "so as not to subject the Treasury to unanticipated liabilities." Pet. App. 22a-23a.

Although petitioners do not discuss that history, they argue (Pet. 14) that the "clear import of the OPM regulation was simply an administrative directive *to agencies* to record their overtime orders and approvals in writing," not to place substantive limits on the availability of overtime compensation. They further assert (Pet. 18-28) that the court of appeals rejected their understanding of the regulation because it mistakenly deferred to the Justice Department's view.

Neither contention is correct. The court of appeals did not purport to defer to a Justice Department interpretation of the OPM regulation. Instead, the court held that "*OPM* did not intend in the regulation to establish a mere administrative instruction." Pet. App. 17a (emphasis added). Because the regulation unambiguously states that overtime "may be ordered or approved only in writing," 5 C.F.R. 550.111(c), the court of appeals correctly concluded that it "was clearly designed to interpret or expound upon the FEPA's 'officially ordered or approved' requirement." Pet. App. 17a. Indeed, as the court of appeals observed, none of the Court of Claims cases on which petitioners relied "suggested that the regulation should be interpreted as a mere administrative instruction." *Ibid.*

b. Petitioners argue (Pet. 16-17) that the court of appeals erred by relying on *Schweiker* v. *Hansen*, 450

U.S. 785 (1981) (per curiam), and *Office of Personnel Management* v. *Richmond*, 496 U.S. 414 (1990), in determining that a line of Court of Claims cases including *Anderson* v. *United States*, 136 Ct. Cl. 365 (1956), is no longer good law. Whether a panel of the court of appeals should have considered itself bound by Court of Claims precedents notwithstanding *Hansen* and *Richmond* is of no moment here, because this Court is clearly not bound by the lower court precedents. Thus, that aspect of the court of appeals' reasoning does not warrant further review.

In any event, the court of appeals correctly determined that the Court of Claims cases on which petitioners relied were inconsistent with *Hansen* and *Richmond*. As petitioners recognize, *Hansen* and *Richmond* held that "estoppel does not lie to obtain payment *contrary* to a valid statute *or regulation*." Pet. 14 (second emphasis added); see *Hansen*, 450 U.S. at 788, 790; *Richmond*, 496 U.S. at 424. Although petitioners disavow an intent to make an "estoppel" argument (Pet. 16), the Court of Claims decisions that petitioners invoke frankly acknowledged their own reliance on principles of estoppel. For example, in *McQuown* v. *United States*, 199 Ct. Cl. 858 (1972), the plaintiff contended that overtime work was "induced and coerced by his supervisors" and that "[s]uch coercion took place * * * with the knowledge and approval of officials authorized to approve overtime work, who accepted the benefits of the overtime without making any effort to provide the pay benefits created by statute, thereby *estopping* the [government] from relying, on the provisions that overtime must be officially ordered or approved in writing." *Id.* at 866 (emphasis added). Immediately after describing that estoppel theory, the

Court of Claims embraced it, explaining: "Such a theory of recovery of overtime compensation has been firmly established by the decisions of this court in *Anderson*" and its progeny. *Ibid.* Similarly, *Anderson* based an award of compensation not on the issuance of an official order, but on the theory that the government had received a benefit based on subconscious "subterfuge." 136 Ct. Cl. at 371.

Even if the Court of Claims cases did not rest on estoppel, they would be inconsistent with *Hansen* and *Richmond* for a more fundamental reason: they failed to defer to the valid regulation implementing the FEPA. It is well established that all valid regulations must be enforced. See *FCIC* v. *Merrill*, 332 U.S. 380, 384-385 (1947). In *Hansen*, this Court held that because that rule applies alike to "procedural" and substantive regulations governing entitlement to government funds, "[a] court is no more authorized to overlook [a] valid regulation requiring that applications be in writing than it is to overlook any other valid requirement for the receipt of benefits." 450 U.S. at 790. Overlooking such a regulation is precisely what the Court of Claims cases did, and precisely what petitioners have asked the courts to do in this case. As a result, the court of appeals correctly concluded that "the *Anderson* line of cases is inconsistent with *Hansen*." Pet. App. 12a.

The circuit conflict that petitioners allege (Pet. 17-18) regarding the interpretation of *Hansen* and *Richmond* is illusory. Petitioners do not and could not suggest that any of the decisions they cite imposed monetary liability on the United States contrary to the terms of a valid federal regulation. *Johnson* v. *Guhl*, 357 F.3d 403, 409 (3d Cir. 2004), rejected the contention that a State's delay in processing Medicaid applications

should bar the State from enforcing an eligibility requirement that was consistent with federal law. In *Jackson* v. *Culinary School of Washington, Ltd.*, 27 F.3d 573, 582-585 (1994), vacated and remanded on other grounds, 515 U.S. 1139 (1995), the D.C. Circuit held that a federal agency's practice of refusing to enforce student loans under specified circumstances did not give the plaintiffs an enforceable right to bar collection of their loans.

FDIC v. *Ernst & Young LLP*, 374 F.3d 579, 581-582 (7th Cir. 2004), held that the FDIC had standing to bring suit in its corporate capacity although it was injured in its capacity as receiver, in light of its commitment, made consistently with federal law, to distribute any proceeds as if they were paid to the FDIC as receiver. In *Doe* v. *Tenet*, 329 F.3d 1135, 1145 (2003), cert granted, 124 S. Ct. 2908 (2004), the Ninth Circuit emphasized that rights invoked by alleged former spies were allegedly consistent with, and, indeed, "clearly authorized by statute and regulation." *Flick* v. *Liberty Mut. Fire Ins. Co.*, 205 F.3d 386, 391-392 (9th Cir.), cert. denied, 531 U.S. 927 (2000), held that a claimant under a standard flood insurance policy may not avoid strict enforcement of a 60-day sworn proof of loss requirement, except through a valid waiver by the Federal Insurance Administrator. None of those cases authorized monetary recovery against the United States contrary to a valid federal regulation.

c. Petitioners cannot seriously contend that the requirements of the OPM regulation were satisfied in this case. As the court of appeals explained, the passage from the U.S. Attorney Manual that petitioners invoke (Pet. 3) expressly advises attorneys that overtime compensation must be approved in writing, that U.S. Attor-

neys are not authorized to provide such approval, and that attorneys generally should not expect compensation for extra hours worked. Pet. App. 26a. The court explained that it had also reviewed the "wide variety of writings" that petitioners invoked, *id.* at 24a, and that "none of them includes an express directive to work overtime, and none communicates the approval of overtime work by those officials authorized to order overtime." *Id.* at 26a-27a. That fact-intensive determination does not warrant this Court's review.[3]

d. Petitioners insist (Pet. 16) that, if the court of appeals' decision is allowed to stand, "the Department can demand unlimited overtime work and obtain it free." But as the government acknowledged below and as the court of appeals stressed, the denial of compensation for overtime that was not officially ordered or approved is not a license to demand uncompensated overtime work. Pet. App. 27a-28a & n.8. If an employee were to refuse

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[3] Although petitioners assert (Pet. 18) that it is "undisputed" that "overtime work for Justice Department attorneys was officially both ordered and approved, constantly and repeatedly," the government has always disputed that assertion, as well as petitioners' characterization of many of the documents at issue. See, *e.g.*, Gov't C.A. Reply Br. 27-30. Even the trial court did not conclude that the class members had been expressly ordered to work overtime, and instead declared that "[t]he question in this case is whether less than explicit orders or approvals suffice." Pet. App. 45a. The court of appeals likewise concluded that no member of the class ever received a written order or approval. See pp. 18-19, *supra*. Although petitioners insist (Pet. 19, 21-22) that the court of appeals added to the OPM regulation a requirement of "prior" approval of "specific amounts" of overtime, it did not adopt any such requirement. Instead, the court of appeals determined that the U.S. Attorney Manual does not even "order an indefinite number of overtime hours," Pet. App. 26a, and rejected petitioners' contention that after-the-fact awareness of case management records reflecting extra hours of work was tantamount to written approval of those hours, *id.* at 27a.

to work extra hours without compensation and the government were to take an adverse personnel action, "that action might well be found invalid." *Id.* at 27a-28a. There is no basis, however, for imposing monetary liability on the United States in a manner that is inconsistent with the terms of the governing regulation.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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